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No. 95-1568

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ANN M. VENEMAN, Secretary, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; ISLAM SIDDIQUI, Assistant Director, CALIFORNIA DIVISION OF PLANT INDUSTRY; STATE OF CALIFORNIA, *Petitioners*,

v.

PACIFIC MERCHANT SHIPPING ASSOCIATION, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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I. THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND MERIT REVIEW

Respondent's Brief in Opposition ("Br. Opp.") tries to recharacterize both the nature of the alleged discrimination in this case, and the basis for the California Supreme Court's decision below. The California Supreme Court invalidated California's agricultural pest inspection fee for foreign commerce solely on the ground that the fee statute facially discriminated against foreign commerce in favor of domestic interstate commerce. See Appendix to Petition ("Pet. App.") 1, 9, 17-18. The California Supreme Court did not find, and did not base its decision on the ground that California's inspection fee was invalid because it discriminated against foreign commerce in favor of intrastate commerce. In fact, the California Supreme Court expressly noted that this case was "atypical" because there was no contention that the challenged fee provisions "also favor California intrastate commerce." Pet. App. 18. (Emphasis added).

The California Supreme Court thought that the standards that apply in interstate commerce discrimination cases also should apply in this case. That is why that court thought that decision of this case was controlled by *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992), and *Oregon Waste Systems v. Dept. of Environmental Quality*, 114 S.Ct. 1345 (1994) -- two interstate commerce discrimination cases. The State contends that these interstate commerce discrimination standards should not apply in this foreign commerce case because: (1) there is no "economic protectionism"[1/] or discrimination in favor of intrastate commerce; (2) State inspection fees were used mainly to fund federal enforcement of federal agricultural pest laws;

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1. By "protectionism", the State means state attempts to benefit in-state economic interests at the expense of out-of-state competitors by discriminating against interstate commerce in favor of intrastate commerce.

and (3) federal law creates the same fee discrimination against foreign commerce and in favor of interstate commerce which was found to violate the dormant Commerce Clause. The California Supreme Court thought that the above three characteristics were unimportant, and that the strict standards proscribing interstate commerce discrimination applied here notwithstanding these characteristics.[2/]

Thus, the principal issue decided below and presented in this petition is: Do the Commerce Clause tests that are applicable to state discrimination against interstate commerce in favor of intrastate commerce also apply in a case alleging discrimination against foreign commerce in favor of interstate commerce when the three characteristics described above are present.[3/]

This controversy over the applicable Commerce Clause standards implicates the Court's decisions in *Maine v. Taylor*, 477 U.S. 131 (1986), an interstate commerce discrimination case, and *Barclay's Bank, PLC v. Franchise Tax Board*, 114 S.Ct. 2268 (1994), a foreign commerce discrimination case. California readily acknowledges that when a State discriminates against interstate commerce and in favor of intrastate commerce, the "clear statement" rule of *Maine v. Taylor* applies in determining whether Congress

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2. The California Supreme Court thought that it made no difference that the major portion of the State's inspection fees was transferred to the United States Department of Agriculture ("USDA") to enforce federal agricultural pest quarantine and inspection laws. Pet. App. 24. That court also attached no weight to the fact that federal law set up the same type of fee regime for foreign commerce as that established by the State. See Pet. App. 2-3.

3. We say this is the "principal" issue presented because the second question presented in the petition for certiorari is whether one can validly characterize California's fee distinctions as "facially discriminatory" given the different characteristics of the underlying foreign and interstate commerce inspections and inspection programs.

meant to authorize such "protectionist" state regulation. But California contends that in light of *Barclay's Bank, supra*, a different standard of congressional authorization applies when a state regulates foreign commerce and when the three characteristics or factors described above are present. Respondent disputes this interpretation of *Barclay's Bank* and contends that the "clear statement" rule of *Maine v. Taylor* applies to state regulation of foreign commerce like that in this case.[4/]

This issue is significant both because of its implications for Commerce Clause doctrine and federalism. California contends that there are different Commerce Clause policies and principles at work in different factual settings. Where there is no economic protectionism in favor of in-state interests and when federal law itself effects the very type of discrimination at issue, the dormant Commerce Clause should not exert the same restraining influence that it has when Congress has not acted in the field and when state regulation seeks to advantage in-state interests at the expense of out-of-state competitors. Both the California Supreme Court and respondent have failed to identify any underlying Commerce Clause principles and justifications why California's regulation is repugnant to the dormant Commerce Clause, other than the simplistic refrain that foreign commerce is a "federally protected class of commerce." Pet. App. 22; Br. Opp. 22. But that is the question: on the facts of this case, is foreign commerce

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4. Contrary to respondent's suggestion, Br. Opp. 15-16, *Kraft General Foods, Inc. v. Iowa Dept. of Revenue and Finance*, 505 U.S. 71 (1992) did not resolve this issue. In *Kraft*, Iowa's tax treatment was not exactly like that of the federal government. *Id.* at 74. ("Unlike the Federal Government. Iowa does not allow a credit for taxes paid to foreign countries.") Nor did *Kraft* have the level of federal authorization that is present in this case such as use of the challenged state fees in the enforcement of federal law pursuant to a cooperative agreement between the State and federal government.

"protected" by the Constitution when Congress obviously has not protected it but has, in fact, discriminated against foreign commerce in favor of interstate commerce by imposing inspection fees on the former but not the latter. Indeed, the doctrinal confusion is compounded by the California Supreme Court's suggestion that one of the ways to "remedy" the unlawful discrimination in this case is by imposing inspection fees upon interstate commerce seeking to enter California. Pet. App. 37. This truly inverts the "protected" classes of commerce. If anything, shippers in interstate commerce are the "protected" class because federal law prohibits collection of federal inspection fees from them. See Pub.L. 102-142, 105 Stat. 886; 57 Fed.Reg. 14498, 14499 (1992). Shippers in foreign commerce are the "unprotected class" because federal law requires the collection of inspection fees from them. See 21 U.S.C. section 136a(a)(1)(A); 7 C.F.R. section 354.3(b)(1). Yet, the California Supreme Court chastised the State for collecting inspection fees from foreign shippers (even though such shippers are not protected under federal law from fees), and urged California to impose fees on interstate commerce shippers, who are exempt from federal inspection fees. The fact that California subsidizes inspections for interstate commerce seeking to enter the State creates the kind of open access to a State's market that the Framers would have applauded. For the California Supreme Court to urge the State to start imposing fees on interstate commerce and close off this open access (ironically, in the name of the Commerce Clause) is a regressive step.

The importance of the issues in this case to federalism also should not be discounted. There is a long history of federal-state cooperation in agricultural pest eradication and control. The record in this case reflects the close relationship between USDA and the California Department of Food and Agriculture in a joint effort to protect the State and Nation from foreign agricultural pests that can cripple our agricultural economy. See e.g., Pet. App. 101-123.

Whether and to what extent the dormant Commerce Clause restrains such cooperation merits this Court's attention.

II. RESPONDENT'S CHARACTERIZATION OF THE STATE'S REGULATION IS INACCURATE

Respondent's opposition tries to recharacterize the nature of the State's regulation and the alleged discrimination in this case by arguing that: (1) this case really involves discrimination in favor of intrastate commerce and in-state economic interests; (2) the inspection fees collected from marine carriers are excessive and exceed the cost of the inspection services provided by the State; (3) money from the inspection fees was spent on domestic inspection programs and other state programs; (4) the inspection fees can be adjusted based on factors unrelated to foreign commerce inspection program costs. These claims are either unsupported by evidence in the record, or are disputed by the State and were not ruled upon below.

1. Alleged Intrastate Commerce Discrimination

Despite respondent's assertion that California's inspection fees discriminate in favor of intrastate commerce, the California Supreme Court did not rule that way, and did not invalidate the State's fee on that ground. In fact, both the California Court of Appeal and the California Supreme Court noted that respondent's challenge was predicated on alleged discrimination against foreign commerce and in favor of domestic interstate (not intrastate) commerce. See Pet. App. 9 (noting that Respondent's pleading alleged the fee scheme "imposes a discriminatory and unreasonable burden on carriers in foreign commerce that is not imposed on carriers in domestic interstate commerce, in violation of the federal commerce clause"); 17-18, 34 ("Pacific Merchant contends only that the Legislature's decision to impose an inspection

fee on foreign marine commerce but to provide free inspections for domestic interstate commerce at state taxpayer expense unconstitutionally discriminates against foreign commerce."); 46 (describing respondent's summary judgment motion).

Respondent also cites purported "facts" in its opposition in support of its intrastate commerce discrimination claim. These purported "facts" are neither contained in, nor supported by, the record.[5/] Having chosen to litigate its case on grounds of discrimination against foreign and in favor of interstate commerce, respondent should not be permitted to make factual allegations about alleged discrimination in favor of intrastate commerce that are unsupported by any record citation, and based on speculation.[6/]

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5. See, for example, Br. Opp. 24 & n. 20 (purported facts about the extent of intrastate commerce and California-based businesses engaged in such commerce); 25 (purported facts regarding California trucking companies engaged in intrastate commerce). Nor has respondent cited to the record for any evidence that intrastate shipments of agricultural produce within California move by air or marine vessel, and are inspected locally within California but are not charged inspection fees. The fact that interstate ocean commerce is limited to United States citizens, Br. Opp. 8, hardly helps respondent's intrastate discrimination argument. If interstate ocean transport is open to all U.S. citizens, then non-California companies can engage in such commerce (and theoretically might be the only companies engaged in such commerce).

6. Insofar as respondent purports to challenge intrastate inspections conducted by California counties, its lawsuit only named State agencies or officials as defendants. No California counties are parties to this litigation; nor is there a complete factual record nor any factual findings by the courts below regarding the extent or circumstances of any intrastate inspections conducted by counties. Respondent's attempt to inject this issue into this case at this stage should be rejected.

2. Excessive Nature of the Foreign Commerce Fees

The California Supreme Court declined to address the issue of the alleged excessive nature of the State's fee, see Pet. App. 41, n. 16, and did not adopt as factual findings the various accounting manipulations which occupy much of respondent's opposition. See Br. Opp. 5-9. Inspection program costs and accounting allocations were partly in dispute. Consequently, the California Supreme Court made only limited factual findings about comparative costs of the interstate commerce and foreign commerce inspection programs. See Pet. App. 7-9, 35. Because respondent's other financial and accounting interpretations were not the subject of findings below, they should be disregarded.

Respondent's claim that the State conceded that its fee exceeded the costs of inspection, Opp. Br. 17, is not correct. The State has always maintained that the foreign commerce inspection fees were spent entirely on the foreign commerce inspection program. Pet. App. 99-100, 134. Respondent misleadingly equates the entire inspection program with one component of the program -- vessel inspections -- and leaves out other program components like the public information program, blitzes, etc.

3. Alleged Subsidization of Domestic Inspection and Other Programs

The California Supreme Court also made no findings, and did not invalidate the State's inspection fee on grounds that foreign commerce fees were spent on domestic interstate commerce inspections or other programs. The California Airport and Maritime Plant Quarantine, Inspection, and Plant Protection Act, Cal. Food and Agriculture Code sections 5350-5353, ("the California Inspection Act") requires foreign commerce inspection fees to be used solely for purposes of the California Inspection Act. See Cal. Food and Agriculture Code section 5353(e). The California Court of

Appeal also noted that: "All fees collected support the air and marine inspection program and not the general fund; in fact, the program has a separate fund and line item in the budget from the rest of the Department." Pet. App. 51. California officials also stated that foreign commerce inspection fees were used solely for the California Inspection Act program. Pet. App. 99-100, 134.

Respondent also claims that the California Inspection Act, and specifically Food and Agricultural Code section 5350, apply to interstate or intrastate commerce, therefore the statute does not create a separate inspection program for foreign commerce. Br. Opp. 2-4. However, the California Supreme Court thought that section 5350 set up a foreign commerce inspection program. The California Supreme Court referred to the "statutory obligation under section 5350, subdivision (b), to provide for the inspection of ships carrying agricultural goods into California from foreign countries". Pet. App. 5. (Emphasis added). Because the California courts are the ones to construe California law, respondent's different characterization of section 5350 should be disregarded.

4. Adjusting Foreign Commerce Fees Based on Factors Unrelated to the Inspection Program

Respondent also suggests that the State adjusts the foreign commerce inspection fee based on factors unrelated to the foreign commerce inspection program. Br. Opp. 7 & n. 8. This is apparently another attempt to recast the inspection fee as a general revenue raising device which is used to subsidize other state programs. Again, neither the California Supreme Court nor the California Court of Appeal so concluded, nor did those courts adopt findings about the accounting manipulations upon which respondent's argument is based. When the State reduced its foreign commerce inspection fee, it continued to devote that fee to the foreign commerce inspection program which included the public

information program, funding of periodic blitzes, and cooperation with federal authorities on smuggling investigations. Pet. App. 7. Thus, fees continue to be used to assist in enforcement of federal inspection and quarantine laws for foreign commerce.

III. THE COURT CAN PROPERLY ENTERTAIN ALL OF THE QUESTIONS IN THE PETITION FOR CERTIORARI

Respondent contends that the congressional authorization issue cannot be included in the petition for certiorari because this specific theory was not argued below. Br. Opp. 12. While the State did not raise this specific congressional authorization theory in those terms, all of the necessary facts and elements of the theory were presented to the California Supreme Court. Thus, the California Supreme Court concluded that the fact that the State's inspection fees were used by USDA for its enforcement of federal agricultural pest laws was "without significance." Pet. App. 24. That court also recognized that federal law imposed agricultural pest inspection fees upon foreign commerce just like those collected by the State. *Id.* at 2-3. Thus, while the congressional authorization theory was not argued as such, the elements of it were noted or addressed by the California Supreme Court.

The Court has not applied an ironclad rule that theories not specifically raised below will not be entertained upon certiorari. See *Hormel v. Helvering*, 312 U.S. 552, 556-559 (1941); *United States v. Speers*, 382 U.S. 266, 277 (1965); *Allen v. State Board of Elections*, 393 U.S. 544, 554 (1969); *City of Houston v. Hill*, 482 U.S. 451, 467 n.16 (1987). Particularly where there are no unresolved factual issues which are a necessary predicate for the congressional authorization theory, it is not inappropriate to entertain this question in the petition. Because the State has always maintained that it did not violate the dormant Commerce

Clause, the congressional authorization theory is "not a new claim . . but a new argument to support what has been [the State's] consistent claim", and it consequently can be raised in the petition. *Lebron v. National Railroad Passenger Corp.*, 115 S. Ct. 961, 965 (1995). (Emphasis added). See also *United States v. Williams*, 504 U.S. 36, 40-43 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n. 8 (1991).

CONCLUSION

The petition for certiorari should be granted.

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